Of BITs and pieces, resistance and simplification

ajv2016 2019-02-01T15:00:04

It has been a pleasure to read to what now amounts to an exchange of views between Prof. Ranjan and Kanad Bagchi on some of the critical issues surrounding the foundations and functioning of international investment law (IIL), especially in relation to 'Third World' countries. Being deeply interested in the topic, and a member of the KFG 'International Rule of Law – Rise or Decline?' that has been mentioned by Mr. Bagchi in his remarkable post, I felt a need to share some thoughts on this exchange of views.

The one overarching thought that has been with me ever since reading both posts is that at their core they talk about different things. As one (less welcome) result, both authors might see each other as 'oversimplifying' or 'myopic'. On the other hand, however, the uptake is that IIL practice and scholarship (and international law more generally) not only has room, but a deep need for both sets of perspectives. Provided, of course, that academic courtesy and full intellectual honesty remains *de rigueur.* Let me elaborate on this in a bit more detail.

At least as I understood it, Prof. Ranjan's comments touch upon two big sets of issues. One is that India has been in a series of cases held liable for breaching certain fundamental rule of law principles through the mechanism of investor-State dispute settlement (ISDS) which it voluntarily subscribed to – just to later denounce the investment regime in relatively scathing terms. The other set of arguments is that bilateral investment treaties (BITs) which put the investor protections in place are themselves essential for successful economic development through the paradigm of 'embedded liberalism'. These points are also peppered with a number of comments and remarks about TWAIL scholars and scholarship, which in all honesty do not in themselves necessarily contribute to the arguments being made; and in addition, seem to provoke a large part of Mr. Bagchi's answer.

But back to the big points for a moment. Mr. Bagchi's answer makes a series of legitimate points about the imperial/neo-colonial pedigree of the IIL regime, in addition to questioning (on the basis of empirical research) the proposition that BITs are actually essential for economic development. I would suggest that there is little in these points that can be *a priori* dismissed as either unredeemably 'Marxist' or 'myopic'. These are factors and facts that are a part of the IIL equation and there would be little point in not recognizing them or failing to engage with them seriously.

But once the perspective shifts from the origins and political economy towards the operation of the IIL regime itself, there is further considerable scope for heated one-sidedness, or at least blind spots. For one, I would suggest that TWAIL scholarship should take into account that, for better or worse, ISDS is sometimes not only a powerful but the *only* mechanism at the disposal of an individual or an entity to put

a spotlight on (and sometimes obtain compensation for) severe and inexcusable breaches of fundamental rule of law principles at the national level. And this is not some idealized, fresh-from-the-Heavens version of the rule of law to which everyone should aspire to but only the chosen ones will ascend to. In a large number of cases, host States were sanctioned because their institutions simply and blatantly breached either domestic law or other international legal obligations assumed by the host State. In an even larger number of cases, the subject matter of the dispute indeed had nothing to do with fundamental social rights, development, environment or community interests. They were simply about lack of due process, arbitrariness or gross negligence that can be easily shown to be in contravention of the domestic law of those very States. In those (quite numerous) situations, this author would be happy to be convinced how such a behaviour is anything close to heroic anti-colonial resistance and/or how ISDS is the imperial villain.

Here another set of Mr. Bagchi's remarks has special relevance. For him, this IIL-imposed rule of law can only be used by the rich and powerful foreigners, exactly the ones who do not really need it, or need it infinitely less than the underprivileged communities in the host States being sued. It is hard to overstate how much I agree that this is a major issue. But neither that point, nor the shady imperialistic past of IIL, negate the fact that India (in this case) was openly called out and made to pay because it failed to act as it itself prescribed that it should. Saying that IIL history and the baggage it carries negate any potential rule of law benefits that come out of such cases as listed by Prof. Ranjan is to me (pardon the bluntness of the comparison) akin to saying that the saviour of a drowning puppy deserves no credit, because the saviour's father was a serial killer.

A way forward? I believe that a putting on the table and comprehensively weighing all the factors is the proper path for both States and scholars. Additionally, a good deal of courteous openness towards 'the other side' is a necessity. Starting from this latter point, and asking again for pardon for perhaps too strong a caricature, I do not believe it makes any sense in portraying TWAIL scholars as plotting to institute the dictatorship of the proletariat as soon as the vigilance of investment arbitrators and scholars falters for a minute. Likewise, nothing is to be gained from misrepresenting investment arbitrators and scholars as modern day Stanleys and Lugards, striving to subjugate and transform 'the Other' if given half a chance.

States should deeply re-think their participation in the regime, in a sufficiently rational way. One side of the equation certainly contains the problematic history of IIL, the often-unanticipated curtailments of regulatory autonomy, or the dubious empirical effects of BIT's in attracting foreign direct investment. Unlike in times of 'bounded rationality' (as convincingly argued by Lauge Poulsen), States should now have a far clearer picture of what IIL entails. Unlike what Mr. Bagchi seems to assume, IIL is no longer 'take it or leave it', nor is it necessarily insidiously imposed. States such as Indonesia and South Africa leave the regime, some (like India) reform their BITs, and some keep their BIT conclusion business as usual (ironically, the *enfant terrible* of IIL, Argentina, is also in that group). And yet, on the other side of the equation, there should be a recognition of points put forward by, among others, Prof. Ranjan. In many countries around the globe, there are no external mechanisms that can be

used to highlight and sanction rule of law breaches. As flawed as they are, IIL and ISDS *can* do that in many cases, and have an unprecedented global reach. They can also lead to deeply disturbing results. As much as one perhaps dislikes it, the situation *is* complex and more nuanced than either of the contributions in question tend to admit to the 'other' camp.

To conclude with some questions rather than answers, perhaps the real issue is not why ISDS does what it does, but why we do not have the same or a similar mechanism for those not lucky enough to be foreign and making investments? Why is the regime largely born out of countering NIEO sometimes the only one that provides some level of legitimately protecting an individual's human rights? Perhaps those are also some of the questions the sorely needed 'transformative approach' to international law should tackle. They require a deep reflection on part of all those interested in the rule of law, be it national or international.

Velimir Živkovi# is a research fellow with the Berlin/Potsdam Research Group 'International Rule of Law – Rise or Decline?'. All statements are made in personal capacity and do not necessarily represent the views of the Research Group or any of its other members.

Cite as: *Velimir Živkovi#,* "Of BITs and pieces, resistance and simplification", *Völkerrechtsblog*, 1 February 2019.